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IN THE

# Supreme Court of the United States

**October Term, 1964**

**No. 332**

LOUIS GLADSTEIN,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*To the Honorable Chief Justice and Associate Justices of of the Supreme Court of the United States:*

Petitioner, Louis Gladstein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 7, 1964.

## Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals is printed in Appendix A and is not officially reported at this time.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 7, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(I).

## Questions Presented

1. Whether or not, the petitioner was so prejudiced by the introduction of voluminous hearsay testimony and the failure of the District Judge to adequately remove said evidence from the consideration of the jury as to constitute a violation of the petitioner's right to a fair trial and deprive the petitioner of due process of law?

2. Whether or not, in view of the evidence presented, the conspiracy count of the indictment was obtained by the United States Attorney merely so that hearsay evidence otherwise inadmissible could be presented to the jury; and if this procedure constituted bad faith on the part of the government thus adversely affecting substantial constitutional rights of the petitioner?

## Statutes Involved

1. Title 18 United States Code, Section 371.

2. Title 18 United States Code, Section 659.

3. Title 18 United States Code, Section 2.

The text of the Statute and Rule are printed *infra* in Appendices B, C and D.

## Statement

On June 22, 1962, the petitioner, Louis Gladstein, was indicted for the substantive crime of violating Title 18 United States Code, Section 659. The indictment also charged the petitioner with conspiracy to commit the crimes set forth in the aforementioned statute. The case was tried between August 20, 1963 and August 23, 1963, before the Hon. Thomas J. Murphy, District Judge, and a jury.

The main thrust of the government's attack was directed towards the charge of conspiracy. It was the government's contention that various conversations and actions which took place between the defendants and the petitioner, formed the basis of a conspiracy to violate the laws of the United States. The alleged scheme as presented by the government was as follows:

Pitts and Manin were to go to Albany, New York from New York City to obtain a truckload of dresses. They were to get a truck from the petitioner, and return the dresses

to Elgisser who would supposedly pay for them. It was the government's further contention that certain statements by Elgisser, in which he stated he would take anything that they could get, established the interstate nature of the conspiracy.

After presenting its entire case, 75% to 80% of which consisted of testimony by Pitts and Cogdell and related to the conspiracy, the trial court granted the defense motion dismiss the conspiracy count on the grounds that the government failed to prove a *prima facie* case. Thus, the major portion of the evidence presented by the government which was subject to connection and allowed into evidence as relating to the conspiracy parts of the indictment, was rendered inadmissible as being hearsay evidence.

Thereafter, the defense requested that the court give specific limiting instructions to the jury in regard to the hearsay testimony. The defense contended that since the hearsay was so voluminous, nothing less than specific instructions regarding specific portions of evidence would be sufficient.

At this point the defense rested, both sides summed up and the case went to the jury. The petitioner was found guilty of violating the substantive count of the indictment.

## Reasons for Granting the Writ

The government, on the basis of two flimsy statements which when read out of context may be interpreted in almost any manner, indicted and tried a man on conspiracy to commit a federal crime. This was done with full knowledge on the part of the government, that all the acts testified to showed a conspiracy took place within the borders of New York State and at no time was there even a hint that the nature of the act could ever be interstate thus involving the federal government. It seems ludicrous, to say the least, that the government could cause a conspiracy count to be placed in an indictment solely with this type of evidence as a basis. Yet, to draw any other conclusion shocks one's sense of fair play and justice.

One is led to the inescapable conclusion that the government, although fully aware of all the circumstances, asked for a conspiracy indictment so that evidence otherwise inadmissible could be placed before the jury at trial.

The government was fully aware of the fact that the major portion of its evidence was hearsay and could only be admitted subject to proving a *prima facie* conspiracy. The government was also aware of the practicalities involved in the court giving so called "limiting instructions" and knew that the jury could not possibly disregard all it heard. This is especially true when the majority of the case consisted of hearsay testimony. The government also knew that the *prima facie* case of conspiracy could not be proved. Thus, it used the charge of conspiracy as a device to put before the jury evidence that would so prejudice the minds of the jurors, especially by its volume, that they

could not fail to convict the petitioner herein of the substantive charge in the indictment.

It is respectfully submitted that the procedure of the government which in effect has been sanctioned by the District Court and the Court of Appeals, Second Circuit, has deprived the petitioner of his constitutional rights to a fair and impartial trial and due process of law.

It cannot be disputed that criminal conspiracy forms the basis for a vast amount of prosecution in the Federal Court system. Furthermore, no precedent need be cited here for the proposition that the Supreme Court of the United States has time and again upheld the validity of these cases. However, situations such as the one in this petition cannot be tolerated.

## POINT I

**The action of the government in indicting and trying the petitioner for conspiracy and the substantive crime of receiving stolen goods constituted bad faith inasmuch as the government was aware that the conspiracy charge was baseless and without legal foundation.**

Inasmuch as there is no rule that requires that each defendant in a criminal prosecution be afforded a separate trial, the defendant must rely upon two safeguards to protect him against guilt by association. The first is that the trial court give proper limiting instructions. The second is that the government, especially where the crime of conspiracy is involved, moves for the joint indictment and trial in good faith. If both these safeguards are followed,

then as pointed out in *United States* v. *DeFillo*, 2 Cir. 1958, 257 F. 2d 835, 839:

> "It is fundamental to the jury system that they will be presumed to follow the court's charge and to limit their consideration to the evidence which may be properly applied against each defendant when more than one defendant is on trial. Delli Paoli v. United States, 352 U. S. 232, 239-241, 77 S. Ct. 294, 1 L. Ed. 2d 278; United States v. Falcone, 2 Cir. 1940, 109 F. 2d 579, 582 affirmed on other grounds, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128."

In the case at bar, it appears obvious that the government has resorted to the quite devious tactic of using the conspiracy portion of the indictment and trial to obtain a result that might be characterized as a "vicarious" conviction. That is, although the government was well aware of the fact that it could not possibly prove the conspiracy, it felt that the evidence in regard to the conspiracy was essential to obtain a conviction on the substantive crime.

The Circuit Court of Appeals, Second Circuit, by Medina, J., has held that the limiting instructions given by the court are adequate to safeguard the rights of a defendant when there is a just trial:

> "In the absence of bad faith on the part of the government in bringing the conspiracy count, 'or some special circumstances of an extraordinary and unusual character'." United States v. Manfredi, 275 F. 2d 588, 593, 2 Cir. 1960, cert. denied 363 U. S. 828, 80 S. Ct. 1598, —— L. Ed. —— (1960); United States v. Schaffer, 266 F. 2d 435, 443, 2 Cir. 1959.

It is the petitioner's contention, that this Court would be hard pressed to find a better case to exemplify the "bad

faith" referred to by Judge Medina than the case at bar. The fact is that "bad faith" is too mild a term to describe the government's action. Nothing less than an authoritative opinion by the Supreme Court of the United States will place said official conduct in its proper perspective.

## POINT II

**The hearsay evidence admitted in connection with the conspiracy count of the indictment in addition to other damaging hearsay testimony was so voluminous as to render it impossible for the court to eradicate its prejudicial effect from the minds of the jury by limiting instructions, thus depriving the petitioner of a fair trial.**

The petitioner herein was charged with conspiracy to violate a federal law. The reason ultimately advanced for such charge is that one of the alleged co-conspirators had made two statements which the government relied upon to show the conspiracy. (See the government's Memorandum of Law submitted at the end of its case.)

After the defense moved to dismiss the conspiracy count on the ground that the government failed to prove a *prima facie* case, and after hearing argument on both sides, the court granted said motion. The question then arose as to what the court should do about the large amount of testimony that now had to be excluded from the consideration of the jury. See *Fiswick* v. *United States*, 329 U. S. 211, —— S. Ct. ——, —— L. Ed. ——; and *Glasser* v. *United States*, 315 U. S. 60, —— S. Ct. ——, —— L. Ed. ——.

The petitioner now contends that although the trial court attempted to withdraw the aforementioned evidence

from the consideration of the jury, it was an impossible task. The damage had been done and the petitioner had been irreparably prejudiced.

Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 445-458, 69 S. Ct. 716, 723, 93 L. Ed. 790, put it well when he stated:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter the accused is often confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.* (Emphasis supplied.) The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, all practicing lawyers know it to be unmitigated fiction. See Skidmore v. Baltimore and Ohio R. Co., 167 F. 2d 54."

In further taking to task the system of conspiracy trials, Justice Jackson stated in *Krulewitch* v. *United States*, *supra*:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that

> birds of a feather are flocked together. If he is silent, he is taken to admit it, and if, as often happens co-defendants can be prodded into accusing or contradicting each other, they convict each other * * *."

These words could not have found a better example than that of the instant case. This is so, for in addition to the tremendous volume of testimony dealing with the conspiracy, the government introduced evidence dealing with confessions of co-defendants. The most damaging statement was that of Max Manny Elgisser.

While it is true that the trial court attempted to give limiting instructions to the jury, it is beyond comprehension how jurors, even with such instructions, could disregard the fact that 80% of this inadmissible evidence pointed the finger of guilt at the petitioner.

## Conclusions

Whereas this case could not be considered a "mass conspiracy trial," the same evils attributed to this type of trial were present during the four days that it took to dispose of the instant case. This is compounded by the fact that the government knew that the conspiracy portion of the indictment was baseless.

Now is the time for this learned court to speak out against such injustice. It is time that they placed the person accused of conspiracy on an equal plane with the accusor and recognize that the act of giving limiting instructions to the jury cannot atone for the damage and prejudice which has already been done to the person accused of this heinous crime.

In view of the foregoing it is prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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## Appendix A

### Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 313—September Term, 1963.

(Argued February 11, 1964 Decided July 7, 1964.)

Docket No. 28566

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UNITED STATES OF AMERICA,

*Appellee,*

*v.*

MAX MANNY ELGISSER and LOUIS GLADSTEIN,

*Appellants.*

---

Before:

LUMBARD, *Chief Judge,*
WATERMAN and FRIENDLY, *Circuit Judges.*

---

Appellants seek reversal of their convictions, United States District Court for the Southern District of New York, Murphy, J. with jury, for having violated 18 U. S. C. §659. Conviction affirmed.

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ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Peter Fleming, Jr., Charles A. Stillman, Asst. United States Attorneys, of counsel) for Appellee.

*Appendix A*

DANIEL H. GREENBERG, New York City, for appellant Elgisser.

BOBICK & DEUTSCH (Arthur Addess, of counsel), New York City, for appellant Gladstein.

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WATERMAN, *Circuit Judges*

In the first count of an indictment Louis Gladstein and Max Manny Elgisser, along with William James Pitts, James Offie Cogdell, and Edward James Manin, were charged with having conspired, on and after December 1, 1961, to violate Title 18, Section 659 of the United States code. That section makes it a crime either to steal from an interstate facility goods moving in interstate or foreign commerce, or to receive or possess such goods knowing them to be stolen.[1] A second count charged Pitts and Manin with

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1. The statute provides in pertinent part:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

* * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * *

the substantive offense of knowingly possessing such goods on December 10, 1961; and a third count charged Elgisser and Gladstein with having committed the substantive offense of knowingly possessing such goods on December 11, 1961. Pitts and Cogdell pleaded guilty before they were brought to trial, and both testified for the Government at the joint trial of Gladstein, Elgisser, and Manin, held in the United States District Court for the Southern District of New York before Judge Thomas F. Murphy and a jury. At the close of the Government's evidence the conspiracy count was dismissed as to all of the defendants, and, none of the defendants desiring to offer further proof, the case then went to the jury on the two substantive counts that alleged knowing possession of stolen goods. The jury found defendant Manin guilty on the second count of the indictment and defendants Gladstein and Elgisser guilty on the third count. The judgments of conviction were entered accordingly.

Defendants Gladstein and Elgisser have appealed from their convictions. Defendant Gladstein claims (1) that the trial court erred in failing to give a charge which properly instructed the jury as to the limited use which could be made of certain evidence, out-of-court statements by the various defendants, which had been admitted subject to connection under the conspiracy count without limitation as to purpose; and (2) that there was insufficient evidence to support his conviction. Defendant Elgisser joins defendant Gladstein in the latter's first claim of error, and he argues further that the court erred in admitting real evidence which had allegedly been seized illegally by the fed-

eral agents who arrested him and Gladstein. We find all three claims of error to be without merit and accordingly affirm both convictions.

The Government's evidence consisted largely of the testimony of Pitts and Cogdell and established the following: On Wednesday, December 6, 1961, Manin approached Pitts in a New York gas station where Pitts worked, spoke to him about some dresses which Manin had in his possession, and Pitts offered to try to sell them for Manin. Later that day Pitts contacted Cogdell, who informed Pitts that he would take him to a man that evening who would buy all the dresses Pitts could get. That night the trio met defendant Elgisser and Elgisser purchased twenty dresses from Manin. Either Manin or Pitts also told Elgisser that they could obtain a "load of dresses" but would have difficulty in securing a truck to transport them. Elgisser indicated that he could help them obtain the needed vehicle.

The following day, Thursday, Manin, Cogdell and Pitts drove to a butcher shop owned by Elgisser; and, after Cogdell had talked to Elgisser and had secured the necessary directions, the three drove on to defendant Gladstein's wrecking lot on Boston Post Road in the Bronx. All three went inside, and Cogdell asked to see the owner of the lot. Gladstein then appeared and asked Cogdell, "Are you the fellow?" Cogdell replied in the affirmative, and Gladstein, having just picked up a telephone which had begun to ring, said into it, "Yes, they're here now." Gladstein and his visitors then left the office of the wrecking lot and got into a car which was sitting outside. Gladstein asked about "the load of dresses" which Elgisser had told him about,

indicated that he was upset by the fact that Elgisser was involved with the matter, and said that "being as you know him already, there's already been a deal, let it go at that." After discussing with the three their need for a truck, Gladstein showed them a Reo truck with a red cab and blue body which he said he could have ready for them by six o'clock the next evening. Pursuant to this arrangement, the following evening, Friday, December 8, Manin, Pitts and Cogdell returned to Gladstein's wrecking lot for the truck. Gladstein said that the truck ran well, he provided license plates for it, admonished the three to "be careful," and furnished Cogdell with a telephone number to call when the truck was returned to New York. Pitts, Cogdell and Manin then left the wrecking lot in the truck and later that evening Pitts and Manin drove it to Albany.

In Albany, Pitts and Manin failed to make contact with the party from whom they were to obtain the dresses, and they decided to stay in that city overnight. The following evening, Saturday, December 9, Pitts and Manin entered an Albany freight terminal owned by Crowe and Company, Inc., an interstate trucking firm, and took away various cartons containing children's rubber boots, phonograph records and clothing. The two then returned to New York with the load of cartons, arriving back in the city on Sunday morning, December 10. They phoned Cogdell to tell him that they had returned and then met him at the gas station where Pitts worked. Cogdell then called the telephone number which Gladstein had given him; and, pursuant to instructions which he thereupon received from a "Mike" on the other end of the line he, assisted by Pitts

and Manin, took the loaded truck to a truck stop at Baychester Avenue and Boston Post Road in the Bronx and left it there.

On Monday, December 11, at about 4:00 P.M., Cogdell stopped at Gladstein's wrecking lot and asked for Gladstein. Gladstein appeared and told him, "California's [Manin's] been here and collected the money, I gave him $500 and—I gave him $500—well, that's the best I could do." Later that day, between about 5:00 and 5:30 P.M., under circumstances to be described in detail later in this opinion, FBI agents who had been keeping the Reo truck under surveillance arrested Gladstein and Elgisser in the Bronx. Immediately prior to the arrests, Elgisser had been in the body of the truck and Gladstein had been driving it. A search of the truck revealed that it contained miscellaneous goods, including some of the cartons of rubber boots and two of the cartons of phonograph records which had been stolen from the Crowe and Company Albany terminal. Gladstein, at the time of arrest, told the agents that the truck had been left with him to sell and that he was moving it off the street to an unidentified lot farther up the road. When directed by the agents to drive the truck to his own lot, which, interestingly enough, was only one hundred feet away, Gladstein did so and had no difficulty parking the truck there. Gladstein consented shortly thereafter to a search by FBI agents of a Bronx store owned by him. The searchers there found additional cartons of rubber boots, one carton of phonograph records, and one carton of clothes, all of which had been part of the load stolen from the Crowe and Company terminal.

*Appendix A*

At the close of the Government's case Judge Murphy dismissed the conspiracy count of the indictment for failure of proof. If the Government had succeeded in establishing the existence of the alleged conspiracy, the jury would have been permitted to consider, under the established exception to the hearsay rule that makes admissible against every member of a conspiracy the declarations of any one conspirator which have been made in furtherance of the conspiracy, unsworn out-of-court statements made by any of the defendants as evidence against every one of them. *Krulewich* v. *United States*, 336 U. S. 440, 69 S. Ct. 716 (1949); *United States* v. *Mishkin*, 317 F. 2d 634 (2 Cir.), *cert. denied*, 375 U. S. 827, 84 S. Ct. 71 (1963); *United States* v. *Ler*, 276 F. 2d 605 (2 Cir.), *cert. denied*, 363 U. S. 812, 80 S. Ct. 1248 (1960). However, a failure to establish the existence of a conspiracy would render inadmissible for this broad purpose the out-of-court declarations which, subject to the Government's establishing the alleged conspiracy, had already been permitted to come into evidence against the defendants generally. On the other hand, there being no indication of bad faith on the part of the Government in bringing the conspiracy count, or of special circumstances requiring a different procedure, the defendants have no valid objection if the use of the evidence introduced against them subject to proof of a conspiracy were properly so limited. *United States* v. *Manfredi*, 275 F. 2d 588 (2 Cir.), *cert. denied*, 363 U. S. 828, 80 S. Ct. 1598 (1960); *United States* v. *Schaffer*, 266 F. 2d 435 (2 Cir. 1959), *aff'd*, 362 U. S. 511, 80 S. Ct. 945 (1960). This was done here and the limiting instructions which Judge Murphy gave to the jury adequately protected these defendants.

*Appendix A*

After the close of the Government's case and the dismissal of the conspiracy count, and before the summations and the charge to the jury, Judge Murphy informed the jury that the conspiracy count had been dismissed and instructed the jurors to "confine your thinking to the evidence that was received that related to a specific defendant as distinguished from some conversations that were had in his absence." During his charge Judge Murphy devoted considerable attention to the matter of the limited use to which the jury could put the codefendant declarations:

> Secondly, there was considerable testimony which I permitted in evidence on the representation that the government was going to connect it later on. This related generally to the conspiracy count, which is no longer in the case, and to a large extent related to conversations that Mr. Pitts had with Manin, sometimes called California, and conversations with Mr. Cogdell and also related to conversations that Cogdell had with Pitts and Manin.
>
> If the government had proved the conspiracy, according to the way I understand the law, the conversations by conspirators could be admissible against all conspirators even though they were not present. But since I have dismissed the conspiracy you must disregard that testimony and consider only the testimony that relates to specific defendants and only those conversations had with a specific defendant and in that defendant's presence. Now, this does not exclude any conversations that Mr. Pitts or Mr. Cogdell made with the defendant Elgisser as long as you remember that it can be considered by you only with regard to the defendant Elgisser and not relating to Gladstein. It also does not exclude any conversations Pitts or Cog-

dell had with the defendant Gladstein, but you must consider that such conversations are to be considered by you only with regard to Gladstein and not with regard to Elgisser.

These interim instructions and the charge of the trial court adequately apprised the jury that it was not to consider the unsworn out-of-court statements of any one defendant as evidence against any other defendant.[3] See *United States* v. *Manfredi*, *supra*, at 593-94; *United States* v. *Schaffer*, *supra*, at 443; *United States* v. *DeFillo*, 257 F. 2d 835, 839 (2 Cir. 1958), *cert. denied*, 359 U. S. 915, 79 S. Ct. 591 (1959); *United States* v. *Herskovitz*, 209 F. 2d 881, 885-86 (2 Cir. 1954). In fact, the instructions and charge may well be viewed as having gone beyond this, for, literally read, they even barred as evidence against the defendants all statements by Pitts and Cogdell which were made out of the defendants' presence. Of course, since Pitts and Cogdell testified in court as to their own prior declarations the hearsay rule could not possibly have operated to render these statements inadmissible in any way; and, as long as the requirements of relevancy and materiality were met, the statements were admissible against any of the defendants. See *United States* v. *Mishkin*, *supra*, at 637.

Contrary to defendant Gladstein's second claim of error, there was sufficient evidence to establish that his possession of the stolen goods had been with the requisite knowledge that they had been stolen. Two days after the

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3 Though defense counsel objected to the charge it should be noted that counsel gave the court no written requests to charge, despite a specific invitation by the trial judge to do so.

goods had been stolen Gladstein was apprehended driving his own truck, the one which had been used in the theft, which contained most of the stolen goods. The rest of the goods were found, shortly after Gladstein was taken into custody, in a store owned by him. At trial Gladstein offered no explanation for his possession. This in itself was sufficient to entitle a jury to draw the permissible inference that Gladstein had possessed the goods knowing them to have been stolen. *United States* v. *Minieri*, 303 F. 2d 550 (2 Cir.), *cert. denied*, 371 U. S. 847, 83 S. Ct. 79 (1962); *United States* v. *Lefkowitz*, 284 F. 2d 310 (2 Cir. 1960). Moreover, there was considerable evidence other than unexplained possession by Gladstein tending to establish guilty knowledge on his part. Gladstein's statements to Cogdell and Pitts, made when arrangements were being worked out for the use of Gladstein's truck, tended to establish that Gladstein realized that the vehicle was going to return with stolen goods, as did the warning to "be careful" which he issued when he turned the truck over to them the following day. Finally, the use of the telephone number given Cogdell by Gladstein to receive instructions as to where to park the truck loaded with the stolen goods, as well as Gladstein's statement to Cogdell that he had paid Manin $500 and "that's the best I could do," constituted additional evidence on this issue damaging to Gladstein.

We come now to defendant Elgisser's claim that evidence seized at the time of his arrest without a warrant, consisting of the stolen goods then in his and Gladstein's possession, should have been suppressed and not permitted

to be introduced against him at trial. The testimony adduced at the hearing on the motion to suppress established the following: On the morning of Monday, December 11, 1961, the New York office of the Federal Bureau of Investigation received information from a confidential informant who, according to agents of that office, had furnished reliable information in the past, that a Reo truck with a red cab and a blue body containing rubber boots and phonograph records which had been stolen in upstate New York, was parked in the vicinity of the Boston Post Road in the Bronx. Agent Griffin P. Martin thereafter caused the upstate FBI office in Albany to be contacted and learned from that office that, over the previous weekend, the Crowe and Company trucking terminal in Albany had been burglarized. The burglars were reported to have stolen cartons of children's rubber boots that were in interstate commerce. An attempt was then made to locate the Reo truck, and at 1:00 P.M. that day the truck was located on Cruger Avenue, just off the Boston Post Road, in the Bronx. The truck was put under surveillance by agent Martin, who was relieved later that day by agents Beardsley, Brown, Scannell and Miller.

Agents Beardsley and Miller testified that at the time they relieved agent Martin they had been advised that the truck contained a quantity of merchandise, including cartons of children's rubber boots, which had been stolen the previous weekend from upstate New York, and that the Albany FBI office had verified a theft of interstate merchandise of that type from an upstate New York terminal the past weekend. Agent Miller testified that he had been

told by agent Martin that the information as to the truck's contents had come from a confidential informer of high reliability. Agent Martin testified that he did not know who the informer was, but nevertheless maintained that he knew that the informer was reliable. The four agents relieving agent Martin split up into two surveillant teams, with agents Miller and Scannell taking up a position in a parked car some distance behind the truck on Cruger Avenue, and with agents Brown and Beardsley maintaining a mobile surveillance of the truck from another car.

At about 5:20 P.M., agents Brown and Beardsley observed a man dressed in a white smock, who they later determined was defendant Elgisser, open the body of the truck and get in. They radioed this information to agents Miller and Scannell, who approached the truck in their car. Agent Miller got out of his car and went over to the truck, knocked on the door to its body, and called out "FBI." Elgisser open the truck door and at once agent Miller was able to observe that Elgisser was holding in one hand a pair of children's rubber boots and in the other a flashlight. He also observed children's rubber boots on the floor at Elgisser's feet, and he could also see, farther back in the body of the truck, other cartons, one of which had children's rubber boots sticking out of it.

Agents Miller and Scannel then took Elgisser into custody, and by radio informed agents Brown and Beardsley of the arrest and of what agent Miller had observed in the truck. A few minutes later the truck pulled out. Agents Brown and Beardsley followed it for about a block, waved it over to the curb, and arrested the driver, defendant Gladstein. The body of the truck was opened and a quick search

revealed that it contained children's rubber boots. These were seized and later introduced in evidence against the defendants, along with phonograph records also found in the truck. These were shown to be part of the loot stolen in the upstate burglary.

The admissibility of the evidence which was seized depends, of course, upon the legality of the search which was made of the truck, and this in turn depends upon whether the arrests, made without warrants, were legal. Agents of the FBI have statutory authority to make felony arrests without a warrant for offenses "committed in their presence," or where they have "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony. 18 U. S. C. §3052. The "reasonable grounds" requirement of the statute is equivalent to the Fourth Amendment's requirement that arrests may be made only upon "probable cause." *Wong Sun* v. *United States*, 371 U. S. 471, 478, fn. 6, 83 S. Ct. 407, 412 (1963); *Henry* v. *United States*, 361 U. S. 98, 100, 80 S. Ct. 168, 170 (1959). What constitutes "reasonableness" or "probable cause" must depend upon the specific facts of each case. *United States* v. *Williams*, —— F. 2d —— (2 Cir. May 15, 1964), *(per curiam)*; *United States* v. *Wai Lau*, 329 F. 2d 310 (2 Cir. 1964) *(per curiam)*, but it is clear that in every case the Government has the burden of establishing that the probable cause requirement has been met. *Wong Sun* v. *United States*, *supra*; *Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280 (1925); *United States* v. *Rivera*, 321 F. 2d 704 (2 Cir. 1963). We think that the totality of the circumstances in this case warranted the court below in finding

that the Government had sustained its burden, and had established that information available to the arresting agents at the time of the arrests was such as to "warrant a man of reasonable caution in the belief" that a felony had been and was being committed. *Carroll* v. *United States*, *supra*, at 162, 45 S. Ct. at 288.

At the time agents Miller and Scannell arrested Elgisser, they had been advised that a "reliable" confidential informant had told the FBI that the Reo truck, a Reo truck with a red cab and a blue body, they had been assigned to watch contained goods which had been stolen in upstate New York. If this had been the only information available to the arresting agents at the time of arrest we would be reluctant to find that the Government had met its burden of esablishing that this arrest was lawful. Only information from a reliable informer will suffice to establish probable cause, see *Draper* v. *United States*, 358 U. S. 387, 79 S. Ct. 329 (1959), and for this reason an accusation by an informer cannot itself furnish probable cause where arresting agents have "no basis in experience for confidence in the reliability" of the informer's information. *Wong Sun* v. *United States*, *supra*, at 480, 83 S. Ct. 407, 413. Moreover, where information received from an informer is essential to the establishment of probable cause, his name may not be withheld from the judge or magistrate whose duty it is to determine whether the probable cause requirement has been met. *United States* v. *Santiago*, 327 F. 2d 573 (2 Cir. 1964); *United States* v. *Robinson*, 325 F. 2d 391 (2 Cir. 1963). As we said in the *Robinson* case, decisions as to the reliability of informers who have been furnished information used to make an arrest "should not be left in the hands

of law enforcement officers who may later be called upon to justify their action; they may safely be left only in the hands of some impartial judge or magistrate." 325 F. 2d at 391.

In this case the only evidence on the issue of the previous reliability of the informer was the opinion of FBI agents that the informer was reliable. Agent Martin, who, it appears from the record, was the testifying agent who knew the most about the informant, stated that he believed the informant to be reliable but admitted that he did not know who the informer was. It would seem that if the burden of establishing probable cause is in truth to be placed on the Government in these cases, and if the existence or absence of probable cause is in fact to be determined by an impartial judge or magistrate, then, where the existence of probable cause depends solely upon the reliablity of an informer, the Government must be required to do more than establish that, in the opinion of the agents directing or participating in the arrest, the informer was reliable, or that in the agents' opinion information furnished by the informer in the past had been found to be reliable, whatever that may mean to them. The Government, in order to carry its burden of proof on the issue of probable cause, at least ought to be required to name the informer and to indicate what information the informer has furnished in the past, and with what results. Otherwise, the finding of the existence or absence of probable cause in a case where the reliability of the informer is at issue will not depend upon the considered judgment of an impartial judge or magistrate, but upon the judgment of law enforcement officers involved in the arrest.

Here, however, the arresting agents, at the time of arrest, had before them more than a tip that the truck on which they had been directed to keep a watch contained stolen goods. The Albany office of the FBI had told the New York office that an upstate terminal had been burglarized and that goods of the type reported by the informer to be in the truck had been stolen. Thus, the correctness of the informer's tip had to some extent been confirmed through corroboration. See *United States* v. *Boston*, 330 F. 2d 937 (2 Cir. 1964); *United States* v. *Wai Lau, supra; United States* v. *Rivera, supra; United States* v. *Nicholas*, 319 F. 2d 697 (2 Cir. 1963); *United States* v. *Williams*, 219 F. Supp. 666 (S. D. N. Y. 1963), *aff'd per curiam*, —— F. 2d —— (2 Cir. May 15, 1964). Moreover, as Elgisser opened the rear door of the truck in response to Miller's knock, Miller observed, immediately before Elgisser was arrested, that the truck contained children's rubber boots, goods of the type which Miller had been informed had been stolen the previous weekend in the upstate New York burglary. Under all the circumstances, we think that the arrest of Elgisser, and the arrest of Gladstein a few minutes later, were both made upon probable cause.

The judgments of conviction appealed from are affirmed.

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LUMBARD, *Chief Judge* (concurring):

I concur in affirming the judgments of conviction. However, as I believe that much of what Judge Waterman has written regarding probable cause is unnecessary to the

facts of this case, I think it advisable to emphasize that here the FBI agents had probable cause to make the arrests on the basis of information in possession of the FBI and what they themselves knew and saw. This information and knowledge was quite apart from the reliability or unreliability of the person who informed them on the morning of December 11, 1961 that a Reo truck with a red cab and blue body parked in the vicinity of the Boston Post Road in the Bronx contained rubber boots and phonograph records which had just been stolen in Albany.

As Judge Waterman points out, the check which the agents then made and their own observations when the back of the truck was opened voluntarily in response to their knocking, taken together with the Bureau's confirmation of the fact that rubber boots and phonograph records had in fact been stolen the day before from a freight terminal owned by Crowe and Company, Inc., an interstate trucking firm, in Albany, were sufficient to give the agents probable cause to believe that a crime had been committed and that Elgisser and Gladstein were then and there in the act of committing the crime of which they stand convicted. Therefore, cases such as *United States* v. *Robinson*, 325 F. 2d 391 (2 Cir. 1963) where the arresting officers knew nothing more than what the informant had told them, are not in point and need not be discussed.

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FRIENDLY, *Circuit Judge* (concurring):

I concur in both opinions.

## Appendix B

### Title 18 U. S. Code, Section 2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, Section 17b, 65 Stat. 717.

# Appendix C

## Title 18 U. S. Code, Section 371

Conspiracy

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

## Appendix D

### Title 18 U. S. Code, Section 659

Interstate or foreign baggage, express or freight; state prosecutions.

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods,

or chattels, or whoever buys, receives or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. As amended May 24, 1949, c. 139. Section 13, 63, Stat. 91.

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 332

LOUIS GLADSTEIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 430

MAX MANNY ELGISSER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 334 F.2d 103.

## JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964. Gladstein's petition for a writ of certiorari (No. 332) was filed on July 29, 1964. Elgisser's petition for a rehearing was denied by the court of appeals on July 27, 1964. His petition for a writ of certiorari (No. 430) was filed on August 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the officers arresting petitioner Elgisser had reasonable grounds to believe that he was in the possession of merchandise stolen from interstate freight.

2. Whether the trial court properly submitted to the jury the substantive charge of possessing goods stolen from interstate freight after dismissal of a conspiracy charge.

## STATUTES AND RULES INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or

which are a part of or which constitute an interstate or freight shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

18 U.S.C. 3052 provides as follows:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Rule 8, F.R. Crim. P., provides as follows:

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions

connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, F.R. Crim. P., provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

## STATEMENT

Petitioners and three co-defendants were indicted in the United States District Court for the Southern District of New York for conspiracy to steal from interstate freight and for the substantive offense of possessing merchandise thus stolen, in violation of 18 U.S.C. 371, 659. Co-defendants Pitts and Cogdell pleaded guilty and testified for the government in the joint trial of petitioners and defendant Manin. Following the court's dismissal of the conspiracy count at the conclusion of all the testimony, the jury found defendants guilty on the charges of possession. Petitioners Gladstein and Elgisser were sentenced to im-

prisonment for three years and two years, respectively (R. 792-793). The court of appeals affirmed. *United States* v. *Elgisser*, 334 F.2d 103.

1. Both petitioners moved to suppress as evidence the merchandise allegedly stolen from interstate commerce which was seized incident to their arrest. Only Elgisser (No. 430) presses the point in this Court. On the hearing of their motion to suppress, it was shown that on the morning of December 11, 1961, information was received by the office of the Federal Bureau of Investigation in New York City from a confidential informant who had furnished reliable information in the past that a Reo truck with a red cab and a blue body parked in the vicinity of the Boston Post Road in the Bronx contained rubber boots and phonograph records that had been stolen from upstate New York (H. Tr. 40-42).[1] Agent Griffin P. Martin, who so testified, stated that he himself did not know who the informant was (H. Tr. 44). Martin caused inquiry to be made of the Albany office, which advised that the Crowe and Co. truck terminal had been burglarized over the weekend and that cartons of rubber boots moving in interstate commerce had been stolen (H. Tr. 42).

A truck answering the foregoing description was located shortly thereafter on Cruger Avenue just off the Boston Post Road in the Bronx. Martin kept the truck under observation from about 1:00 p.m. until

[1] "H. Tr." refers to the transcript of the hearing of petitioners' motion to suppress. "Tr." refers to the trial transcript.

about 4:00 p.m. He was then relieved by four other agents, to whom he conveyed the information which he had already received (H. Tr. 40-43, 7, 9-10, 14, 16-17, 61-62, 66). Shortly after 5:00 p.m., agents parked some distance to the rear of the truck saw petitioner Elgisser get into the body of the truck (H. Tr. 6, 50). One of the agents knocked and called, "F. B. I." Elgisser opened the door. In one hand he was holding a pair of children's rubber boots and in the other a flash light. No search was then made of the truck, but the agents saw through the open door that there was an open carton containing children's rubber boots and a number of unopened cartons (H. Tr. 51-53, 63). The agents did not then inform Elgisser that he was under arrest but in effect arrested him by requiring him to enter their car, which was driven to the next block and turned around for further observation of the truck (H. Tr. 54). The agents who were conducting a moving surveillance of the truck in the other car were notified by radio of the observation of the boots and the fact that Elgisser was in custody (H. Tr. 64, 19).

A few minutes later, the truck pulled away from its parking spot (H. Tr. 19, 54). The agents in the moving car pulled abreast and stopped the truck. The driver, petitioner Gladstein, said that the truck did not belong to him, but had been left with him several weeks earlier for sale and that he was taking it to find a place to park in some service station. So far as he knew, the truck was empty and he said he had no objection to the agents looking in. The agents opened the door and saw the cartons and a

number of loose children's boots on the floor. Gladstein said that he had not seen the merchandise before (H. Tr. 19-20, 33-34). On these facts, the court denied the motion to suppress (H. Tr. 68).

2. At the trial, events over a five-day period beginning Wednesday, December 6, 1961, were described. Defendant Pitts testified for the government that on this date he had a conversation with defendant Manin in New York City relating to the sale of stolen dresses (Tr. 27) in which defendant Cogdell, who also testified for the government, participated. Cogdell spoke to petitioner Elgisser, who said that he would take anything they could get (Tr. 38-40, 231-232). Elgisser bought twenty of the stolen dresses and asked how many more Cogdell could get. When Cogdell said that he needed a truck, Elgisser replied that that was no problem (Tr. 42-47). Manin said that "Johnny" in Albany was supposed to have a truckload of dresses. Elgisser responded that he did not care where they came from (Tr. 47-48).

Elgisser then directed the three men to a junkyard in the Bronx, where they met petitioner Gladstein. Gladstein said that he did not trust Elgisser and that, in the future, they should deal with him directly. Gladstein said that he could buy or use merchandise like the dresses. He showed them a Reo truck with a red cab and a blue body, which he said would be ready to go the next afternoon. He provided them with a set of license plates, gave them a number to call when they returned and warned them to be careful (Tr. 50-58, 242-247).

On Friday evening, Pitts and Manin drove the truck to Albany. They met "Johnny", but were unable to obtain anything from him. On Saturday night they found a door open at Crowe and Co., a trucking concern, and loaded their truck with cartons they found there which contained rubber boots, phonograph records and clothing (Tr. 58-67, 270). Upon their return to New York City Sunday morning, they notified Cogdell. He called the number given by Gladstein and was directed to take the truck to an address in the Bronx (Tr. 70-71, 248).

On Monday, Cogdell tried to collect from Gladstein, who turned him down, saying that he had given $500 to Manin and that was all that he could pay (Tr. 249). On Monday afternoon, the truck was located by F. B. I. agents near Gladstein's junkyard, followed by the arrest of both petitioners as already described (*supra*, pp. 6-7). Elgisser made a statement to the F. B. I. agents which incriminated Gladstein, but did not sign it (Tr. 357-359, 408, 419, 425). Following Gladstein's arrest in the Reo truck, which he said he was taking to find a parking lot, it was driven to the junkyard, where there was ample space for it. It contained a number of cartons of children's rubber boots, phonograph records and other items (Tr. 373-377). Gladstein then took the agents to a store which he operated, where a number of similar cartons were found containing the same kind of articles (Tr. 378). The cartons on the truck and in the store were identified as missing from Crowe and Co. in Albany (Tr. 270, 284, 362-365, 376, 379, 400-406).

At the conclusion of the government's evidence, petitioners moved for acquittal on both the conspiracy and the substantive charges. The court sustained the motion as to the conspiracy count but denied it as to the substantive counts. The court also refused to grant a mistrial because of dismissal of the conspiracy count, saying that it would instruct the jury, limiting consideration of the evidence received on this charge (Tr. 464-468). No evidence was introduced by petitioners.

## ARGUMENT

1. There was ample basis for crediting the information received from an unidentified confidential informant that a Reo truck having a red cab and blue body was parked in a described locality and contained items stolen in upstate New York. A call to the Albany F. B. I. office corroborated the accuracy of the report and furnished further information as to the time and place of the theft, and the fact that the articles were moving in interstate commerce. Additional substantiation was given when a truck of this rather unusual description was spotted in the area described. Cf. *Draper* v. *United States*, 358 U.S. 307, 311-313.

After petitioner Elgisser was seen to enter the body of the truck, agents approached the truck and called, "F.B.I.". Elgisser responded by opening the door. He was holding a pair of children's rubber boots at the time and additional boots could be seen within. Without any search whatever, there were then reasona-

ble grounds to believe that Elgisser was in possession of some of the stolen articles. The contents of the truck could then properly have been seized, but were not touched until Gladstein had implicated himself by driving the truck away from its parking place. Incidental to his arrest and with his permission, the truck was searched without, however, revealing substantially more than had already been apparent when Elgisser had appeared at the open door of the truck.

In view of the abundant substantiation furnished before the arrest, it is unnecessary to consider the independent sufficiency of the information obtained from the confidential informant whose name was not disclosed and whose reliability was not fully explained. The arresting officers did not act on the information alone, but waited until it had been substantially corroborated. Adding facts uncovered by the officers to the reasonably trustworthy information they had been given, they were clearly warranted in believing that an offense was being committed in their presence. *Brinegar* v. *United States*, 338 U.S. 160, 175-176.

2. The court properly denied the motion for mistrial based upon dismissal of the conspiracy charge. There is no hard-and fast rule that when a conspiracy count fails, joinder is error as a matter of law. *Schaffer* v. *United States*, 362 U.S. 511, 516. See, also, *Fernandez* v. *United States*, 329 F.2d 899, 905 (C.A. 9); *United States* v. *O'Brien*, 319 F.2d 437, 439 (C.A. 7); *United States* v. *Rabin*, 316 F.2d 564, 568 (C.A. 7), certiorari denied, 375 U.S. 815; *United*

*States* v. *Kaufman*, 311 F.2d 695, 698 (C.A. 2); *Dykes* v. *United States*, 313 F.2d 580, 581 (C.A. D.C.), certiorari denied, 374 U.S. 837. The transactions here involved plainly constituted part of a common scheme or plan within Rule 8, F. R. Crim. P. Whether a severance should be granted rests within the sound discretion of the trial court. Rule 14, F. R. Crim. P.; *Opper* v. *United States*, 348 U.S. 84, 95.

There is no merit to petitioners' contention that the joinder of conspiracy with substantive charges was made in bad faith. *United States* v. *Manfredi*, 275 F.2d 588, 593 (C.A. 2), certiorari denied, 363 U.S. 828. The evidence supports the view that Elgisser authorized the men making the trip to bring back whatever might be available, regardless of source. The rather ambiguous language of Gladstein would also seem to grant a similar broad commission (*supra*, p. 7). The situation here is comparable to that in which the implied understanding was that whiskey be stolen from any source which might prove convenient or accessible, where the court held that this would include an interstate shipment and thus support a federal charge. *Clark* v. *United States*, 213 F.2d 63, 64-65 (C.A. 5). Compare also *Pereira* v. *United States*, 347 U.S. 1, 11-12, 14. There is no adequate basis for disregarding the finding of the courts below that joinder was in good faith.

Following the dismissal of the conspiracy charge, the court gave clear and comprehensive instructions limiting the jury in their consideration of testimony as to various conversations, to which no objections

were made.[2] Only three defendants were tried together, so the danger of transference of guilt was small. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 772-773. There was no serious possibility of confusion on the part of the jury, as the evidence against each petitioner was clearly delineated and impressive. *United States* v. *Berling*, 324 F.2d 249, 253 (C.A. 7), certiorari denied, 376 U.S. 955.

Furthermore, the evidence clearly sustained the inference that petitioners engaged with the other de-

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[2] The court instructed (Tr. 535-536):

> Secondly, there was considerable testimony which I permitted in evidence on the representation that the government was going to connect it later on. This related generally to the conspiracy count, which is no longer in the case, and to a large extent related to conversations that Mr. Pitts had with Manin, sometimes called California, and conversations with Mr. Cogdell and also related to conversations that Cogdell had with Pitts and Manin.
>
> If the government had proved the conspiracy, according to the way I understand the law, the conversations by conspirators could be admissible against all the conspirators even though they were not present. But since I have dismissed the conspiracy you must disregard that testimony and consider only the testimony that relates to specific defendants and only those conversations had with a specific defendant and in that defendant's presence. Now, this does not exclude any conversations that Mr. Pitts or Mr. Cogdell made with the defendant Elgisser as long as you remember that it can be considered by you only with regard to the defendant Elgisser and not relating to Gladstein. It also does not exclude any conversations Pitts or Cogdell had with the defendant Gladstein, but you must consider that such conversations are to be considered by you only with regard to Gladstein and not with regard to Elgisser.

fendants in an illegal conspiracy, the only question being whether the agreement contemplated a violation of federal law. In these circumstances, the agency of each to act and speak for the others in the execution of the common plan did not depend upon a formal charge of conspiracy and limiting instructions were not, in fact, necessary. *United States* v. *Sapperstein*, 312 F.2d 694, 698 (C.A. 4); *United States* v. *Olweiss*, 138 F.2d 798, 799 (C.A. 2), certiorari denied, 321 U.S. 744.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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